UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

EDWARD J. WORCESTER,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 98-0155-B
	)	
ANSEWN SHOE COMPANY LIMITED PARTNERSHIP,	)	
	)	
Defendant	)	

MEMORANDUM OF DECISION[1]

This is an action alleging age discrimination under both state and federal law, as well as violations of the Employee Retirement Income Security Act ["ERISA"], 29 U.S.C. secs. 1001-1461, and the Family and Medical Leave Act ["FMLA"], 29 U.S.C. secs. 2601-2654. Defendant moves for summary judgment on the entirety of Plaintiff's Complaint.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'"

[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

FDIC v. Anchor Properties, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

1. Age Discrimination.

As a preliminary matter, the parties disagree whether the standard for analyzing Plaintiff's state law age discrimination claim is the same as that used for his federal claim. The Court concludes that it is. The mere fact that the protections of the Maine statute are not limited to persons of a particular age, as is true of its federal counterpart, does not suggest that a different standard should apply. Under the Maine Act, the question is whether the employee would have been dismissed "but for" his age, regardless whether other factors might also have played a role. *Wells v. Franklin Broadcasting*, 403 A.2d 771, 773 (Me. 1979). The standard is the same under the federal statute. *Hidalgo v. Overseas Condado Ins. Agencies*, 120 F.3d 328, 332 (1st Cir. 1997) (quoting *Mesnick v. General Elec.*, 950 F.2d 816, 823 (1st Cir. 1991) (other citations omitted).

Similarly, when there is no direct evidence of discriminatory animus, both statutes are properly analyzed using the familiar burden-shifting system set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *Hidalgo*, 120 F.3d

at 332; *Wells*, 403 A.2d at 773 n.4. In this Circuit, the first prong of that analysis requires Plaintiff set forth a prima facie case showing that he was over forty years of age (for the federal version), that he was qualified for the job, that he suffered an adverse employment action, and that "'the employer sought some form of replacement performance, which would demonstrate its "continued need for the same services and skills."'" *Hidalgo*, 120 F.3d at 332-33 (quoting *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 760 (1st Cir. 1988) (other citation omitted). Defendant argues that Plaintiff has failed to set forth a prima facie case because he has presented no evidence that he was dismissed because of his age.[2] To the extent such a showing is necessarily a part of the fourth element of the prima facie case, *see O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308, 312 (1996), it is also a part of the ultimate question on Plaintiff's claim. The burden at this stage is not overwhelming, and the Court will therefore presume for purposes of analyzing this Motion that Plaintiff has met his burden. The Court will also assume without deciding that Defendant has

[2] Defendant asserts for the first time in its reply brief that Plaintiff has failed on his prima facie case because he has presented insufficient evidence that he was qualified for the position of Handsewing Supervisor. Reply at 9. Although Defendant did indeed present argument that Plaintiff was actually fired for business reasons, the argument was presented in a form apparently intended to rebut Plaintiff's assertion that it was due to his age. *See*, Reply at 7 ("Plaintiff has simply failed to show that he was terminated as Handsewing Supervisor because of his age."). Even had Defendant properly raised Plaintiff's qualifications in the original Motion, the Court, for reasons set forth in its discussion of "pretext," would in any event find factual disputes precluding summary judgment on this point.

satisfied its burden to provide evidence of a "legitimate, non-discriminatory reason" with its evidence that Plaintiff's termination was an effort to improve performance in Plaintiff's department.[3]

The Court is thus faced with the ultimate question raised by the Motion for Summary Judgment: Has Plaintiff proffered sufficient evidence from which a jury could conclude that the stated reason for his termination was not only a pretext, but a pretext for age discrimination? The Court is satisfied that he has not done so.

Most of the evidence offered by Plaintiff on this issue goes to whether the jury could find Defendant's stated reason was pretextual. Plaintiff has offered testimony to the effect that he was never told his department was performing below expectations, that the only performance evaluations he ever saw indicated his performance was satisfactory, that he received a glowing letter of recommendation upon his termination, and that Defendant indicated on forms provided to the Department of Labor that Plaintiff had been terminated due to a lack of work, rather than deficient performance. *See, Hidalgo*, 120 F.3d at 337 (assuming, without deciding, that similar evidence established pretext). The more difficult question in this case, however, is whether Plaintiff has provided sufficient evidence that the real

[3] Plaintiff's argument to the contrary goes to whether Defendant's stated reason was a pretext. The Court is satisfied that Defendant has met its minimal burden of articulating (not proving) a legitimate reason for its actions.

motive for Plaintiff's termination was age discrimination. On this point, Plaintiff notes that a supervisor who was not terminated, but was instead permitted to attempt to improve the performance of her area, was ten or more years younger than three supervisors, including Plaintiff, who were fired. One of the other supervisors was replaced by an individual twelve years younger. The two persons placed into Plaintiff's position after his termination were both younger than Plaintiff, but by only five and one years, respectively. The Supreme Court has indicated that evidence that a worker has been replaced with an "insignificantly younger" worker is insufficient to create an inference of age discrimination, even in the context of the prima facie showing. *O'Connor*, 517 U.S. at 313. It is certainly insignificant in this case, where there is unrebutted evidence that there were actually eight salaried employees who left the company during the reorganization period, five of whom were younger than Plaintiff. Seven of the nine who remained were over forty, and four were over fifty. On this evidence, the Court is satisfied that no reasonable factfinder could agree with Plaintiff's assertion that his having been replaced by younger workers amounts to age discrimination. Summary Judgment is GRANTED to Defendant on Plaintiff's claims for age discrimination in Counts I and II of the Complaint.

2. ERISA Violation.

The Court concludes that Plaintiff has presented sufficient evidence from which a jury could conclude Defendant terminated him for the purpose of interfering with his ERISA benefits. Defendant's arguments to the contrary are premised solely on the credibility of certain testimony offered by Crystal Martis and Plaintiff. Credibility determinations are appropriately left for the factfinder at trial. *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 49 (1st Cir. 1999). Summary Judgment is DENIED on Plaintiff's claim in Count III of the Complaint.

3. FMLA Violation.

Plaintiff's claim under the FMLA is also analyzed using the three-step *McDonnell Douglas* paradigm. In this case, one element of the prima facie case is that there must be evidence of a causal connection between Plaintiff taking his FMLA protected leave and the decision to terminate his employment, or evidence that he was treated less favorably than persons not taking protected leave.[4] *Watkins v. J. & S. Oil Co.*, 164 F.3d 55, 59 (1st Cir. 1998) (citations omitted). Viewing the evidence in the light most favorable to Plaintiff, a factfinder could conclude that Plaintiff told his employer about his need for leave prior to the decision to terminate him. This sole

[4] The Court again presumes, without deciding, that Plaintiff would meet the other requirements of his prima facie case.

piece of evidence is insufficient, particularly in light of the fact that there were at least three other people terminated. Summary Judgment is appropriate on Count IV of Plaintiff's Complaint.

Conclusion

Accordingly, Defendant's Motion for Summary Judgment is hereby GRANTED on Counts I, II and IV of Plaintiff's Complaint, and DENIED on Count III.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on June 30, 1999.